

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN ASSOCIATION OF PHYSICIAN  
SPECIALISTS, INC.,

Plaintiff,

06 Civ. 14253-WGY  
Memorandum and Order

-against-

BRIAN J. WING, INTERIM EXECUTIVE DEPUTY  
COMMISSIONER, NEW YORK STATE DEPARTMENT  
OF HEALTH, ROBERT W. BARNETT, DIRECTOR,  
OFFICE OF HEALTH CARE QUALITY AND SAFETY,  
RICHARD P. MILLS, COMMISSIONER, NEW YORK  
STATE EDUCATION DEPARTMENT

Defendants

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WILLIAM G. YOUNG, United States District Judge.<sup>1</sup>

Plaintiff American Association of Physician Specialists, Inc. (the "Association") seeks injunctive relief for an alleged equal protection violation under the Fourteenth Amendment and 42 U.S.C. § 1983. Defendant Robert W. Barnett, Director of the Office of Healthcare Quality and Safety of the Department of Health of the State of New York (the "Department"), is the sole remaining defendant.<sup>2</sup>

The Association argues that the Department's failure to

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<sup>1</sup> Of the District of Massachusetts, sitting by designation.

<sup>2</sup> The Association voluntarily dismissed the complaint against Defendants Wing and Mills. Def.'s Reply Mem. [Doc. 55] at 2.

recognize its medical specialty certifications violates the equal protection rights of its members. Because the challenged conduct need only be rationally related to a legitimate government purpose, the Department's actions were constitutional and Barnett is entitled to summary judgment.

**A. Background**

**1. The Challenged Regulation**

The Patient Health Information and Quality Improvement Act of 2000 (the "Act") required the Department to "collect [certain] information and create individual profiles" for licensed physicians "in a format that shall be available for dissemination to the public." N.Y. Pub. Health § 2995a. The physician profiles were required to include "specialty board certification." Id. § 2995a-1(h). In 2001, the Department promulgated regulations defining board certification to mean "a specialty or subspecialty in which a physician is certified" by various medical specialty board associations. 10 N.Y.C.R.R. § 1000.1(a). The regulation did not recognize the Association's specialty certification as one that satisfied the statute. The Association's certification was therefore excluded from the publicly available physician profile.

## 2. The Department's Exclusion of the Association's Certification

Barnett claims this exclusion originally came about due to a recommendation from the Federation of State Medical boards, an organization of officials who oversee physician licensing in many states. Barnett Aff. ¶ 8. Barnett further claims that the Department declined to change its standards when asked to do so primarily because of a discrepancy between the certification requirements of the Association and those of the other specialty board associations. In particular, Barnett notes that the Association will certify a physician as a specialist in emergency medicine even if that physician has not completed a residency in emergency medicine. Barnett Aff. ¶ 20. The regulation, however, only recognizes those board associations that require a residency in emergency medicine before certifying a physician as an emergency medicine specialist. Id. ¶ 36. The majority of the Association's physicians, both nationally and in New York, are certified in emergency medicine. Id. ¶¶ 24-25.

In place of a residency in emergency medicine, the Association offers a practice-based path to board certification. Physicians who have completed five years of practice in emergency medicine and passed the Association's exam are recognized as specialists. Barnett Aff. Ex. L. In the past, other specialty board associations, including those recognized by the regulation,

also had a practice-based track to emergency medicine certification. These tracks were closed, however, once there were a sufficient number of residency programs. Bartfield Decl. Ex. A at 4. Nonetheless, some emergency medicine specialists have been grandfathered in. That is, some number of board-certified emergency medicine specialists who did not complete residencies in emergency medicine fall within the terms of the regulation and, as such, are included in the Department's public profiles. Bartfield Dep. at 13-14 (Sussman Aff. Ex. 21). There is a debate in the medical community over whether emergency room physicians with practice experience are as competent as emergency room physicians who have completed a residency. The Association's position is a minority view. Marshall Dep. 28 (Spiegelman Decl. Ex. P).

In response to the Association's requests for recognition, Barnett sought the opinion of various medical organizations in New York. These organizations unanimously opposed the idea. Barnett Aff. ¶ 15. Barnett notes that several other states and the U.S. Department of Veterans Affairs have also rejected similar claims for recognition from the Association. Id. ¶ 28. Instead of recognizing the Association's specialty certifications, Barnett offered to, and did, add a section to the profile called "professional memberships" which physicians could

use to list the Association's specialty certifications. Id. ¶ 17.

**3. The Association's Allegations of Harm & Irrationality**

For its part, the Association has offered up several physicians who it contends are equally qualified to practice emergency medicine and yet have encountered various professional handicaps due to the fact that they only have specialty board certification from the Association, and not from the other, more widely recognized board certifying organizations. Some of these physicians have received lower pay or had difficulty obtaining their preferred employment. Sussman Aff. Exs. 36-38. The Association holds the Department responsible for these professional setbacks, despite the fact that (1) these particular grievances were inflicted by private actors, and (2) the State of New York has no regulation that generally establishes requirements for board certification in medicine. Sussman Aff. Ex. 21 at 45-46. The state action challenged in this suit relates only to the publicly available physician profile.

The Association further contends that Barnett's refusal to include the Association's certification in the Department's regulation is irrational for several reasons: (1) the decision-making process used to develop the initial regulation and to deny recognition of the Association's certification after it requested

a change was not sufficiently rigorous, Pls. Reply at 10-11; (2) the physician profile deceives the public, Carbone Aff. ¶ 18; and (3) anti-competitive lobbying groups have misled the Department about the importance of an emergency medicine residency in specialty board certifications.<sup>3</sup> Id. ¶ 21.

## II. ANALYSIS

Summary judgment is warranted when, after construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor, there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); June v. Town of Westfield, 370 F.3d 255, 257 (2d Cir. 2004).

### A. The Department's Actions are Subject to Rational Basis Scrutiny

Equal Protection violations brought by plaintiffs who are not part of a protected class are styled "class of one" claims. Village of Willbrook v. Olech, 528 U.S. 562, 564 (2000). To prevail, plaintiffs must show "that they were intentionally treated differently from other similarly-situated individuals

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<sup>3</sup> The Association also contends that the physician profile could list residency training and board certification separately. Carbone Aff. ¶ 17. This argument is a non-starter as the profile already lists residency under the category of "graduate medical education."

without any rational basis." Clubsides, Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir. 2006). Plaintiffs must also show that the state action was non-discretionary. Engquist v. Oregon Dep't of Agriculture, 128 S. Ct. 2146, 2154 (2008). Because the Association and its members are not part of a protected class, the Department's conduct in this action need only be rational. A rational basis can be demonstrated by "any reasonably conceivable state of facts", Connolly v. McCall, 254 F.3d. 36, 42 (2d Cir. 2001), so long as the government conduct is not "palpably arbitrary." N.Y. State Ass'n of Career Schools v. State Educ. Dep't, 749 F. Supp. 1264, 1273 (S.D.N.Y. 1990). Further, to carry their burden plaintiffs must "negative every conceivable basis which might support" the governmental classification. F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 314 (1992). The Government, however, need not produce "empirical data" to sustain the rationality of its conduct. Lewis v. Thompson, 252 F.3d 567, 582 (2d Cir. 2001). Finally, a classification is still rational even though it "is not made with mathematical nicety or because in practice it results in some inequality." Dandridge v. Williams, 397 U.S. 471, 485 (1970).

The Association argues that intermediate scrutiny standard should apply to the Department's conduct since it implicates "an important, though not constitutional, right." Pl.'s Reply at 4 (citing Ramos v. Town of Vernon, 353 F.3d 171, 175 (2d Cir.

2003)). The economic rights of the Association's members, however, do not warrant such treatment. Compare Plyler v. Doe, 457 U.S. 202, 223 (1982) (applying intermediate scrutiny where access to public education was at issue) with Beach, 508 U.S. at 313 (holding that matters of "social and economic policy" that do not involve a suspect class are only subject to rationality review). The Association also proffers a second legal theory. It argues - from caselaw regarding deference to administrative factfinding - that because the challenged state action is an agency regulation, not a statute, the Equal Protection analysis should differ. Pl.'s Reply at 9; Pl.'s Mem. Supp. at 21-25. There is no authority for this proposition. Further, rationality review is also law of the case at this point: the complaint alleges irrationality and Judge Brieant denied Barnett's motion to dismiss on the grounds that the irrationality of the state action was adequately pled.

**B. The Department's Conduct was Rational**

On the basis of the undisputed facts in the record, it is clear that the Department's conduct had a rational basis. There is no record evidence indicating a genuine issue of fact regarding Barnett's reliance on, in the first instance, the Federation of State Medical Boards, and later, various medical organizations within the state. There is no record of evidence of any kind of deception or lobbying, despite the conclusory

allegations of the Carbone Affidavit. Nor is there evidence that Barnett only contacted the medical organizations after he had already determined not to accept the Association's specialty certification.

The Association's allegations that the current physician profiles mislead the public are also without support. The website states that "board certified" means the physician "had graduated from medical school; completed residency...; trained under supervision in a specialty, and passed an exam..." Def.'s 56.1 Statement ¶ 74. This definition is flexible enough to include practice-track physicians who have been grandfathered by the recognized specialty board associations without having completed a residency in emergency medicine.

As regards the classification itself, there is ample evidence in the record that the difference between the Association's requirements and those of the accepted board certifying agencies is a rational one. There is a debate in the medical community over whether emergency medicine doctors can be as effective without having completed a residency in emergency medicine. Such a debate does render the Department's conduct irrational as long as there is some evidence to support the Department's classification. See NYC C.L.A.S.H., Inc. v. City of New York, 315 F. Supp. 2d 461, 495-96 (S.D.N.Y. 2004) (holding that existence of "serious dispute" over harmfulness of second

hand smoke does not affect rationality of government action). It is fair for the Department to conclude, based on the advice of medical organizations and limited circumstantial evidence that physicians with residency training in emergency medicine are more qualified than those who took a practice-track to specialization.

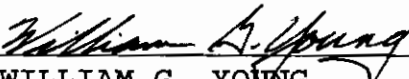
Moreover, the existence of some practice-track physicians listed as board certified in emergency medicine (those that were grandfathered in) does not undercut the rationality of the classification. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." Danridge, 397 U.S. at 485 (internal citations omitted).

### III. CONCLUSION

Because there is no genuine issue of material fact surrounding the rationality of the Department's conduct, Barnett's Motion for Summary Judgment is hereby GRANTED, and the Association's cross-motion is DENIED

SO ORDERED.

Dated:  
September 17, 2009

  
WILLIAM G. YOUNG  
UNITED STATES DISTRICT JUDGE